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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 22

FRED TOYOSABURO KOREMATSU

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

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The American Civil Liberties Union filed briefs *amicus curiae* with this Court in *Hirabayashi* v. *United States*, 320 U. S. 81, and *Yasui* v. *United States*, 320 U. S. 115, because the Union believes that it is of the highest importance that there be definite boundaries set in regard to the power of the military over civilians. This case can and should furnish a further occasion for marking out that boundary more precisely. Although this Court upheld the *Hirabayashi* conviction, it confined its opinion to the curfew restriction. The issue of the detention of persons of Japanese ancestry

—citizens and aliens alike—was not considered. That issue the Union deems of vital importance. It can and should be determined in the case at bar.

I

The Issue in This Case Is the Validity of Military Detention under Armed Guard of Civilian Citizens of Japanese Ancestry.

The United States, the respondent in this proceeding, attempts to sustain the conviction of petitioner by seeking to persuade this Court that the issue before it is solely one of the validity of the evacuation of persons of Japanese ancestry from certain areas on the Pacific Coast. We believe, with petitioner, that this evacuation was without adequate military justification, and in itself was a deprivation of his constitutional rights. But we also believe, and will seek to demonstrate below, that the true issue here is more serious even than that. The true issue posed by this case is whether or not a citizen of the United States may, because he is of Japanese ancestry, be confined in barbed wire stockades euphemistically termed Assembly Centers or Relocation Centers—actually concentration camps. Because petitioner refused to submit to such treatment, he has been adjudged guilty of a crime. The Union believes that such a judgment must not be allowed to stand.

The Background Facts

The true issue inevitably emerges when the events which led up to petitioner's arrest are clearly stated. At the risk of repeating in some measure the recitations in the opinion in *Hirabayashi* v. *United States*, 320 U. S. 81, 85-90, we begin at the beginning.

Japan bombed Pearl Harbor on December 7, 1941; one day later Congress declared war on Japan. 55 Stat. 795.

Over two months later, on February 19, 1942, the President promulgated Executive Order No. 9066 (7 Fed. Reg. 1407). By that Order, the President purported to—

> "authorize and direct the Secretary of War, and the Military Commanders whom he may from time to time designate, whenever he or any designated Commander deems such action necessary or desirable, to prescribe military areas in such places and of such extent as he or the appropriate Military Commander may determine, from which any or all persons may be excluded, and with respect to which, the right of any person to enter, remain in, or leave shall be subject to whatever restriction the Secretary of War or the appropriate Military Commander may impose in his discretion."

On February 20, 1942, the Secretary of War designated Lt. General J. L. DeWitt as Military Commander of the Western Defense Command. On March 2, 1942, General DeWitt promulgated Public Proclamation No. 1 (published in the Federal Register for March 26, 7 Fed. Reg. 2320). This proclamation recited that the entire Pacific Coast—"by its geographical location is particularly subject to attack, to attempted invasion * * * and, in connection therewith, is subject to espionage and acts of sabotage." It further recited that "as a matter of military necessity" certain Military Areas and Zones were established, and stated (Par. 4)—

> "Such persons or classes of persons as the situation may require will by subsequent proclamation be excluded from all of Military Area No. 1 and also from such of those zones herein described as Zones A-2 to A-99 inclusive, as are within Military Area No. 2."

In the meantime, any Japanese, German or Italian alien, or "any person of Japanese ancestry" then residing in Military Area No. 1 who changed his place of habitual residence was required to obtain and execute a change of resi-

dence notice. Military Area No. 1, as defined in the maps accompanying the proclamation, included all of the coastal portions of California, including the City of San Leandro, Alameda County, where petitioner resided. By Public Proclamation No. 2 of March 16, 1942 (published in the Federal Register of March 28, 1942, 7 Fed. Reg. 2405), the military areas and zones were extended to cover the balance of the Western Defense Command area of the eight western states.

Congress entered the picture on March 21, 1942. The Act of that date (56 Stat. 173) provided that anyone who knowingly "shall enter, remain in, leave, or commit any act in any military area or military zone prescribed * * * by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander" shall be guilty of a misdemeanor.

On March 24, 1942, General DeWitt promulgated Public Proclamation No. 3, which imposed the curfew restrictions upheld in *Hirabayashi* v. *United States*, 320 U. S. 81. On the same day, he began the issuance of a series of Civilian Exclusion Orders, each relating to a specified area. That relating to petitioner is Civilian Exclusion Order No. 34 (7 Fed. Reg. 3967.) Before that was issued, General DeWitt had promulgated Public Proclamation No. 4 on March 27, 1942. That order recited that—

> "it is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration"

and, therefore, ordered that as of March 29, 1942—

> "all alien Japanese and persons of Japanese ancestry who are within the limits of Military Area No. 1, be

> and they are hereby prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct."

By March 29, 1942, therefore, petitioner was by military order confined to the limits of Military Area No. 1. This is important in understanding the consequences to petitioner of Civilian Exclusion Order No. 34.

This Order was issued on May 3, 1942 (7 Fed. Reg. 3967). From and after noon, May 8, 1942, it ordered that "all persons of Japanese ancestry, both alien and non-alien, be excluded from that portion of Military Area No. 1" described by boundaries, and including San Leandro, where petitioner resided. The Order further provided (Par. 2) that a responsible member of each family, and each individual living alone, who were covered by the terms of the Order, should report to the Civil Control Station at 920 C Street, Hayward, California (within the limits of Zone 34), between 8:00 A. M. and 5:00 P. M. on May 4 or 5, 1942. Paragraph 4 of the Order excepted from its provisions—

> "all persons within the bounds of an established Assembly Center pursuant to instructions from this Headquarters while those persons are in such Assembly Center."

Contemporaneously with Civilian Exclusion Order No. 34, however, there were issued and effective "Instructions to All Persons of Japanese Ancestry" living in the area involved.[1] By these "Instructions" it was further provided that from noon, May 3, 1942, no Japanese person living in the area would be allowed to change residence

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[1] A specimen "Instructions to All Persons of Japanese Ancestry" is contained in *Japanese Evacuation From the West Coast* (G.P.O.), pp. 99-100. This volume is General DeWitt's Report, transmitted by him to the Chief of Staff, and by him to the Secretary of War, but released to the public only in January, 1944. It is referred to hereafter as "DeWitt Report".

without special permission from the Commanding General, with the further provision that no such permits would be granted except for the purpose of uniting members of a family, or in cases of grave emergency.

Petitioner was thus, on and after May 3, 1942, prevented by law from leaving the limited area of Zone 34.

The purpose of the report to the Civil Control Station, as explained in the DeWitt Report, was "to receive further instructions" on the "evacuation" (p. 100). Had petitioner reported, he would, as described in the Report (pp. 118-126) have been given all of the papers necessary for "evacuation" in an envelope which bore his "family number". He would have been interrogated about his family history, his personal and business affairs, and would have been given an appointment for a medical examination. At the time of this later examination he would have been told of the scheduled date and hour for his departure for Tanforan. The date, hour, place and coach or bus number would have been written on his identification tag. This oral information, in fact, would have been the only order to leave that he would ever have received. He would have gone to Tanforan, in Zone 35, and would have been confined there, both by barbed wire stockades and armed guards and also by reason of the fact that under the terms of Civilian Exclusion Order 35, issued contemporaneously with Order 34, it was made illegal for him to be anywhere in Zone 35 except within the limits of the Tanforan Assembly Center after May 8, 1942.

One more element of the background facts is that pertaining to the War Relocation Authority. This was established by Executive Order No. 9102, issued by the President on March 18, 1942 (7 Fed. Reg. 2165). That Order established the Authority, and authorized its Director to formulate a program for the removal, relocation, maintenance and supervision of the persons authorized to be excluded

under Executive Order No. 9066. Thereafter, the persons ordered excluded by General DeWitt were generally sent first to Assembly Centers operated by the Army, and thence to the so-called Relocation Centers—concentration camps—operated by the War Relocation Authority.

Finally, there are the regulations specifically applicable to the Assembly or Relocation Centers. General DeWitt issued Civilian Restrictive Order No. 1 on May 19, 1942. By this order the internees were prohibited from leaving any such centers without specific authorization.[2] The Civilian Restrictive Order stated (published on January 21, 1943, in 8 Fed. Reg. 982):

> "That all persons of Japanese Ancestry, both alien and non-alien, who now or hereafter shall reside, pursuant to exclusion orders and instructions from this headquarters, within the bounds of established assembly centers, reception centers or relocation centers * * * shall during the period of such residence be subject to the following regulations:
>
> "(a) All such persons are required to remain within the bounds of assembly centers, reception centers, or relocation centers at all times unless specifically authorized to leave as set forth in paragraph (b) hereof.
>
> "(b) Any such person, before leaving any of these centers, must first obtain a written authorization executed by or pursuant to the express authority of this headquarters setting forth the hour of departure and the hour of return and the terms and conditions upon which said authorization has been granted.

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[2] This was, of course, already the practical effect of the prior orders so far as persons like petitioner were concerned. Such persons were sent under military guard to Tanforan, itself inside Military Area No. 1 and inside Zone 35, from which all persons of Japanese ancestry were excluded after May 8, 1942 by Civilian Exclusion Order No. 35. Hence persons of Japanese ancestry could not leave Tanforan without entering the forbidden parts of Zone 35 and thus violating the prior orders.

"2. Any person subject to this order who fails to comply with any of its provisions or with the provisions of the published instructions pertaining thereto will be liable to the penalties and liabilities provided by law."

On June 27, 1942, General DeWitt issued Public Proclamation No. 8 (7 Fed. Reg. 8346), which designated all relocation centers then or thereafter established within the Western Defense Command as War Relocation Project Areas, and imposed the same restrictions with respect to them as were imposed by the Civilian Restrictive Order of May 19, 1942, above quoted.[3]

The leave permits referred to in these orders deserve brief reference. The first formulation of rules was in Administrative Instruction No. 22 of the War Relocation Authority issued on July 20, 1942. In general, the Administrative Instruction provided that any person could apply for a permit to leave the center if he could show that he had a specific job opportunity with a prospective employer at a designated place outside the relocation center and outside the Western Defense Command. The Instruction also provided for an investigation of each such applicant, and that any permit granted could be revoked if the Director of the War Relocation Authority found it necessary in the public interest.

Petitioner's Alleged Crime

Such, then, in broad outline, is the frame of reference within which this Court must determine whether petitioner has been guilty of a crime. In the court below, the majority viewed the case as simply one in which petitioner remained in that portion of Military Area No. 1 covered by Exclusion

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[3] On August 13, 1942, the Secretary of War, by Public Proclamation No. WD-1, imposed similar restrictions with respect to relocation centers outside the Western Defense Command area (7 Fed. Reg. 6593).

Order No. 34 after noon on May 8, 1942, specifically, on May 30, 1942, and was properly found guilty because the *exclusion* was proper. Judge Denman, on the other hand, saw in the series of Orders which have been described above a unified plan which was intended to, and which immediately and inevitably would have forced petitioner into enforced confinement at an Assembly Center (Tanforan) and later at a Relocation Center. Judge Denman recognized that only if petitioner could legally have been forced to submit to such confinement can he be said to have been guilty of a crime in remaining in Zone 34. Because of his conclusion that even this was constitutional, he concurred in the majority opinion. We submit that Judge Denman was completely correct in his analysis of petitioner's position; we wholly disagree with his conclusion.

When Public Proclamation No. 1 was issued, petitioner made no move to leave his home. He remained in San Leandro, as he unquestionably had every right to do. Indeed, he was actually given no warning by that proclamation that he would ever have to move, since it was not addressed to any specific group, but simply served notice that exclusion would later be ordered of "such persons or classes of persons as the situation might require." Petitioner, as a loyal American citizen (as he admittedly is) certainly need not have assumed that he would be affected. On and after March 24, 1942, he became subject to, and presumably obeyed, the curfew regulations contained in Public Proclamation No. 3. *Before he was ever told, however, that he would have to leave his home, he was forbidden by Public Proclamation No. 4 to leave the Pacific Coast.* He had never a choice between ignoring or obeying a warning to leave voluntarily. From March 27 onward, petitioner was helpless to avoid the consequences of his Japanese ancestry without violating the terms of some order.

His situation materially worsened on May 3, 1942. On that date, by the terms of Civilian Exclusion Order No. 34, he was ordered to report to the Civilian Control Station on May 4 or 5, 1942. By the contemporaneous mandatory Instructions, he was, in the meantime, forbidden to leave the territory covered by Civilian Exclusion Order No. 34, and at the same time he was also forbidden to remain in that territory, after May 8, 1942. At this point he rebelled. He did not report, nor did he leave San Leandro. He was still there when arrested on May 30.

But for the fact that the Government makes an argument to the contrary, we should feel that we were attacking a straw man in arguing that petitioner cannot stand convicted unless he could legally be required to submit to internment. The Government cannot, and does not (Brief, p. 28), deny that petitioner had but two choices—to violate the Order and mandatory Instructions, or to submit to internment for an indeterminate period of time. And they were not remote choices, nor were they in any degree hypothetical. They were immediate and inevitable.

Yet after making that admission, the Government's argument proceeds just as it would in a case in which the defendant had a third choice—to leave the area and avoid *either* internment or violation of the Order. Had that choice existed, we would have quite a different case. Had that choice existed, the Government could argue, at least, that for a defendant who stayed on when he should have gone away, *exclusion* would be the sole issue.[4] But *this is not that*

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[4] Even under such circumstances, we believe that the Government would probably fail in its contention. The *detention* was so inextricably intertwined in the whole program that it is scarcely possible to judge the legality of *evacuation* without considering the other aspects of the program with which it was so intimately related. The fact of greatest significance is that with the exception of one group of 257 persons who were allowed five days to move before internment (Gov't Br. p. 7), *no one was ordered to leave and thereafter permitted to choose his manner of leaving.* This

case. Petitioner had no such choice. His choice was either to violate the Order and Instructions or to accept imprisonment. By every rational principle, he must now be able to question the validity of that imprisonment, and to go free of the stigma of criminal conviction if that imprisonment was illegal or unconstitutional.

Actually, we do not overstate the case when we say that in reality there was never any *exclusion* planned at all, and that *internment* was from the beginning the actual objective. We need only bear in mind a few facts. First, persons of Japanese ancestry (except for 257 in Zone 1 in late March, 1942, see note 4, *supra*) never had any choice except to submit to internment. Second, when they were interned, they were not necessarily *evacuated;* four of the ten Relocation Centers were *within* the prescribed area, and the persons sent there have actually never been evacuated.[5] Third, the Government now states in its brief (p. 55) that it would have been equally contrary to the program if persons of Japanese ancestry had simply been shifted to the interior, *i. e.*, evacuated with nothing more. Therefore, the Government argues that imprisonment of the evacuees was essential. Could there be better proof than this that the real program, the heart of the whole plan, was *internment.*

Court said in *Hirabayashi* v. *United States*, 320 U. S. 81, 103, the entire series of Proclamations and Orders are "parts of a single program and must be judged as such." Here, we have parts of a single Order, and the DeWitt Report leaves no doubt as to the complete intergration and interdependence of evacuation and internment. See, *e. g.*, pp. 78, 92, 94, 118-126.

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5 The map opposite page 290 in the DeWitt Report shows four Relocation Centers in Military Area No. 1: Gila River, Colorado River, Manzanar and Tule Lake. The map in the brief filed by the States of California, Oregon and Washington, *amici curiae* (pp. 2-3) is erroneous. Not until a year *after* the plan had been carried out was the boundary of Military Area No. 1 in Arizona adjusted to exclude from it the Relocation Centers at Colorado River and Gila River.

The Government's argument on separability also ignores all of these facts.

But, as we have said above, the salient fact is that this is not an ordinary separability case. It does not raise the question involved in the cases cited by the Government. There the issue is simply whether the statute is such that the portion of it directly involved can stand alone, even if other parts may later be found invalid. If it can, it is "separable", and the validity *vel non* of the other parts can be ignored. Compare *Electric Bond & Share Co.* v. *Securities & Exchange Commission*, 303 U. S. 419, 437. Even on that basis, we believe that Exclusion Order No. 34 is not separable.[6] But here the Government is trying to separate an *inevitable, immediate* consequence. The Government's brief admits that internment was the only way to avoid a violation of the Order, and at the same time argues that it is a "separable" feature. Unless words have lost their ordinary meaning, nothing could have been more *inseparable* than immediate internment.

The Government furnishes its own *reductio ad absurdum*. The brief seems to say (p. 30) that had petitioner violated the Order and Instructions in *another* way—by fleeing—he could then have challenged the validity of the detention provisions. That is simply nonsense. Detention is no more and no less separable from remaining in Zone 34 than from fleeing it.

Loss of liberty, even temporary, is not to be treated lightly. Confinement in a barbed wire stockade under military guard is, or should be, held in horror by us all. Concentration camps, where citizens are sent without warning, without trial, without even individual charges of guilt of anything but ethnic characteristics, should—must—remain the objects of destruction by our armies, not the objects of condonation by our prosecutors and our courts.

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[6] See footnote 4, *supra*.

And they are condoned here, glossed over, minimized. The Government's brief suggests that petitioner submit to loss of liberty and then litigate by *habeas corpus*.[7] It should be unnecessary to assume a worse punishment and ask if the answer would be the same, but perhaps in no other way can the issue be made as vivid as it must be. Does the Government urge that American citizens should have submitted to the Orders and Instructions had they contemplated not only barbed wire concentration camps, but chains, hard labor, bread and water, and the whipping post? Does the loss of liberty become less "separable" if it is thus implemented? Does petitioner, who valued his liberty enough to believe that he could not be thus required to submit to loss of it, lose his standing to challenge the Order only because the plan could have been worse? Unless the answer is "No", we have lost a large segment of a precious heritage of freedom.

Nor can the answer be changed by reliance on *Yakus* v. *United States*, 321 U. S. 414, and *Falbo* v. *United States*, 320 U. S. 549, relied on by the Government (pp. 33-34). The *Yakus* case is patently irrelevant; as the Government itself admits (p. 34), it rests upon explicit statutory provisions. The *Falbo* case is likewise beside the point. There the attack was upon the action of administrative authorities in an individual case under a statute the general validity of which was not questioned. The *Falbo* case it-

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[7] On the efficacy of *habeas corpus*, it may not be amiss to advert to the results of that course in the case of another American citizen of Japanese ancestry, Mitsuye Endo, whose case is now also before this Court (No. 70). Her petition for a writ of *habeas corpus* was filed on July 13, 1942. Not until *one year later*, on July 2, 1943, was it acted on by the District Court, statutory exhortations to speed to the contrary notwithstanding. Now, 27 months later, she is still seeking her freedom. Yet she is admittedly a wholly loyal American. It may also be proper to advert to the fact that even now, in the *Endo* case, the Government's brief suggests that by reason of her involuntary removal from a Center in California to a Center in Utah, Miss Endo's case has become moot, and she should be required to begin all over again.

self goes to the very verge of judicial self-restraint in administrative review. But whatever may be the rule in cases in which individual administrative decisions are attacked, no one has ever supposed that the general invalidity—constitutional or otherwise—of an entire statutory or administrative setup cannot be appropriately challenged when a defendant is criminally charged with violation of the legislative or administrative mandate. See Mr. Justice Rutledge, concurring, in *Falbo* v. *United States*, 320 U. S., at p. 555. Indeed, the Government is not even consistent in its position. It concedes (p. 35) that petitioner may challenge the constitutionality and legality of the exclusion segment of Order No. 34. Fundamentally, therefore, the *Falbo* case, which denied all judicial review, has no application. And if some judicial examination of constitutionality and legality is proper, the *Falbo* case is wholly beside the point as to its scope. The Court in that case was not concerned with separability—the present issue—at all. We submit that the case can safely be put to one side.

The Government also makes a strenuous attempt to impart a national emergency into the case by arguing that petitioner should not now be permitted "to seek indirectly to nullify the vital military measure of exclusion of persons of Japanese ancestry from the West Coast area because of the claimed invalidity of accompanying features of the exclusion program" (p. 31). There are two answers. First, as we have said above, we do not believe that the mass exclusion of citizens of Japanese ancestry from an area equal to a quarter of the entire United States was legal, and we do not believe it will be upheld by this Court when the issue is presented. For that reason, there is no danger in invalidating it now. But second, and more importantly, we do not believe that the validity of exclusion is here involved. The decision by this Court that an il-

legal means—internment—was used in connection with evacuation does not mean that evacuation, *per se*, is illegal. Petitioner here has been excluded in fact. All of the other citizens of Japanese ancestry are now either excluded or confined in concentration camps. Whether they will be permitted to return depends on the validity of the *exclusion*, not on the validity of the *internment*. The Court may proceed to decision with no fear that it will interfere with any action that the Government may *legally* take.

Finally, the Government urges that in any event the petitioner's internment should be split up, and that even if the Assembly Center portion of it be held inseparable, the Relocation Center portion be nevertheless held separable and beyond the scope of proper review in this case. That is hairsplitting with a vengeance. Assembly Centers and Relocation Centers were at all times considered as inseparable concomitants of the internment program. Assembly Centers were admittedly temporary; they served as preliminary concentration camps, in the literal meaning of that term. Before the first Exclusion Order was issued, the War Relocation Authority had been set up on March 18, 1942 (7 Fed. Reg. 2165)—several weeks before the issuance of Exclusion Order No. 34 on May 3, 1942. By May 30, 1942, the date of petitioner's offense, the Relocation Centers had been definitely established as prisons—as internment camps—by Civilian Restrictive Order No. 1 of May 19, 1942. The first evacuees had been sent to Relocation Centers from Assembly Centers on May 26, 1942. The whole program was a thoroughly integrated one; as described in the DeWitt Report (p. 94):

> "In summary, the general plan for controlled movement and relocation provided for three main steps:
>
> "(1) The 'registering and servicing' of evacuees at Civil Control Stations.

"(2) The provision of temporary residence quarters and a minimum of normal community services at Assembly Centers.

"(3) The ultimate transfer of evacuees to Relocation Centers under the administration of the War Relocation Authority."

Indeed, if more proof be needed that the Assembly Centers and the Relocation Centers are in truth inseparable components of the program, it is supplied by the fact that two Assembly Centers—Manzanar and Colorado River—later became Relocation Centers. At Manzanar, the persons who had been "assembled" there were transferred to a Relocation Center by the simple process of transforming their prison from an "Assembly Center" to a "Relocation Center"[3] (DeWitt Report, pp. 246-247, 278). In addition, many "evacuees" never went to Assembly Centers at all; they were transported directly to a Relocation Center (*ibid*).

That no evacuees were in fact moved from Tanforan to a Relocation Center until after May 30, and that there was a possibility (contrary to fact, of course, Government Brief, p. 33) that petitioner might not have been so moved, can have no bearing on the decision. Neither fact justifies, even remotely, the conclusion of the Government (p. 39) that ultimate confinement in a Relocation Center was "hypothetical". It was planned as an integral part of the program, it was carried out as such, and it was fundamental to the whole concept of internment that it should be.

At the minimum, petitioner can raise the full situation as it existed at the date of his alleged violation. On May 30 the Assembly Centers were in full operation, many of the Relocation Centers had been set up and had received their first internees a few days before, and the internment in both Assembly Centers and Relocation Centers had been made

not only certain, but also of unknown length, by the Civilian Restrictive Order No. 1 of May 19. The limitation sought to be imposed by the Government must be rejected.

II

The Internment Which Was for Petitioner the Only Alternative to Violation of the Order Was Both Unauthorized and Unconstitutional.

Once the true issue in this case is understood to be the legality of the internment which petitioner refused to accept, the answer ceases even to be doubtful. We need go no further, in fact, than to the chief law officer of the Government—the Attorney General. Speaking of the internment of American citizens of Japanese descent, the Attorney General testified:

> "And I know of no authority in any Executive order giving them [W. R. A.] the authority, the right, to hold a man against his will in the centers."[8]

And on the issue of constitutionality, even had a grant of such authority been attempted, he stated:

> "The next problem is very much more difficult, and that is the problem of holding or interning an American citizen in a camp after he has been excluded, and that I have the very gravest doubt about, the very gravest doubt, that any government could pick out a citizen on the general ground that his race is a dangerous race and shut him up. I think it is very, very doubtful, constitutionally."[9]

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[8] Hearings before a Special Committee on Un-American Activities, House of Representatives, 78th Congress, 1st Session, Vol. 16, p. 10074, December 9, 1943.

[9] *Ibid.* Note that the Attorney General did not really face the problem. It is not a matter of picking out and interning a single citizen, but a problem of the mass internment of thousands of citizens, and keeping them interned even after investigation has revealed that they are not dangerous.

Why the Government now repudiates its Attorney General, and argues (pp. 44-47) that there was a purported grant of authority to intern American citizens in concentration camps, we do not know. But there is little doubt that he was correct in denying its existence. Executive Order No. 9066 of February 19, 1942, related solely to evacuation. It was founded upon a recital of the necessity for "every possible protection against espionage and against sabotage to national-defense material, national-defense premises, and national-defense utilities." At the time it was issued, no one contemplated that any American citizens were to be imprisoned as a consequence of whatever evacuation might be necessary. The summary of events leading up to the promulgation of the Order which is set out in the DeWitt Report (pp. 25-38) make this clear.

By the same token, the Act of March 21, 1942 (56 Stat. 173), which was passed to implement this Order, contemplated only evacuation, not detention. *Hirabayashi* v. *United States*, 320 U. S. 81, 90-91.

The only other possible purported authority for intern-

Note, too, the concurrence in the Attorney General's views of the Director of War Mobilization, a former Justice of this Court (*Segregation of Loyal and Disloyal Japanese in Relocation Centers*, Sen. Doc. No. 96, 78th Cong., 1st Sess., pp. 19-20):

> "The detention or internment of citizens of the United States against whom no charges of disloyalty or subversiveness have been made, or can be made, for longer than the minimum period necessary to screen the loyal from the disloyal, and to provide the necessary guidance for relocation, is beyond the power of the War Relocation Authority. In the first place, neither the Congress nor the President has directed the War Relocation Authority to carry out such detention or internment. Secondly, lawyers will readily agree that an attempt to authorize such confinement would be very hard to reconcile with the constitutional rights of citizens."

The Secretary of the Interior has also expressed the same view in a Statement released on April 13, 1944, in which he stated: "I believe that the only justifiable reason for confinement of a citizen in a democratic nation is the evidence that the individual might endanger the wartime security of the nation."

ment of American citizens is Executive Order No. 9102, of March 18, 1942. Significantly, the Government does not rely upon this Order. It was clearly designed "to provide for removal from designated areas of persons whose removal is necessary in the interest of national security", and for "their relocation, maintenance, and supervision". No detention, no internment behind barbed wire with the usual concomitant of armed guards, is suggested or even hinted at.

The only argument the Government makes to the contrary is based upon the idea that (p. 46) "detention was a collateral measure closely related to the exclusion and, as such, came within the purpose as well as the literal terms of Executive Order No. 9066."

It is difficult to know how to express strongly enough the utter abhorrence of that suggestion. That means, in simple English, that as a sort of by-product of another grant—as an inferential, peripheral, supplemental power—citizens can be herded behind barbed wire, guarded with men armed with machine guns, and all without any charge of crime against them, much less a finding of guilt. That means, indeed, that citizens can, as a sort of an unimportant collateral consequence of evacuation, be kept in such concentration camps *even after they have been fully cleared of all charges.*[10] Short of the power of arbitrary life and death, the one power which certainly cannot be inferred is the power to deprive a citizen of his liberty.

Besides, the suggestion is silly on its face. Concede that compulsory evacuation requires assistance to the evacuees. Concede that minimal concern with the welfare of the citizens thus uprooted made Government provision for their welfare necessary. Centers where food, shelter, and the

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[10] That is the case with Miss Endo, for example (No. 70, Oct. Term, 1944).

like were freely available were the least that could have been supplied. But what possible basis can there be for turning these shelters into prisons? What possible grounds can be advanced for the collateral necessity for a program of mass imprisonment—not temporary, but now for over two years? What possible grounds exist for drawing an inference that evacuation required barbed wire enclosures, peon wages, machine guns? Such questions need no answers.

Moreover, constitutionally, even had a purported grant of such power been made, there can be no question that it would have been utterly void. The Attorney General's "very gravest doubt" on a less drastic problem (see note 9, *supra*) is fully warranted.

Fully to express our view, we must revert, for the moment, from internment to evacuation. By a brief summary of the reasons which compel a belief in the invalidity of mass evacuation, we can illustrate more clearly the utter lack of any warrant for the concomitant internment of the "evacuees".

Even as far as *evacuation* is concerned, there is every reason to believe that the alleged military necessity for the complete evacuation of all persons of Japanese ancestry from the Pacific Coast never existed. We can presume, of course, that the Army did not start from scratch in its plans for the defense of the Pacific Coast before December 7, 1941. On that day, by Presidential proclamation, the Attorney General was given the authority to evacuate any Japanese alien from any military area anywhere in the United States (DeWitt Report, p. 1). Yet the DeWitt report itself states (p. 6) that not until January 21, 1942, did the Commanding General of the Western Defense Command refer any recommendations for the creation of such areas to the War Department. If military necessity was the reason for complete evacuation, what was the General

doing during those six weeks? Furthermore, what is the explanation for the fact that the 99 areas which he recommended be created in California did not cover all of the State, or even all of its coast, and required the moving of only about 12,000 persons, of whom about half were alien Germans and Italians? It is a strange thing that a military necessity which required the complete evacuation of all persons of Japanese descent in March required the evacuation of only 6,000 on January 21.

General DeWitt does try to show military necessity by reference to reported illegal radio signals which could not be located, lights on the shore, and the like (Report, Ch. 2). The Government's brief (p. 11n.) states, however: "We have specifically recited in this brief the facts relating to the justification for the evacuation, of which we ask the court to take judicial notice, and we rely upon the Final (DeWitt) Report only to the extent that it relates to such facts." This singular repudiation of General DeWitt's testimony on the military necessities, which obviously could be required only by the existence of reliable conflicting information from other sources, is made even more remarkable by comparison of the Government's brief and Chapter II of the DeWitt Report. The brief (pp. 20-26) contains no reference, for example, to illicit radio signals (DeWitt Report, p. 8), signal lights visible from the Coast (*ibid.*), or to the significance attached by the Report to hidden caches of contraband (*ibid.*), location of Japanese settlements near defense installations (*id.*, p. 9), fascistic or militaristic pro-Japanese organizations and Emperor-worshiping program (*id.*, p. 10), and Japanese language schools (*id.*, pp. 12-13). Moreover, in several respects the recital in the DeWitt Report is wholly inconsistent with other facts of public knowledge. It is well known, of course, that radio detection equipment is unbelievably accurate; a "fix" can be obtained which will locate a

radio transmitter not only in a specific house, but in a specific room. Secondly, the fact that no person of Japanese ancestry has been arraigned for any sabotage or espionage since December 7, 1941, certainly suggests, in view of the unquestionable efficiency of the F. B. I., that no such acts were committed by such persons. Nor can it be said to be wholly without significance that in four of the five cases in which, during this war, trial courts have taken testimony on alleged military necessity for action against civilians (by direct testimony of military authorities), the asserted military necessity has been found not to exist in fact. *Schueller* v. *Drum*, 51 F. Supp. 383 (E. D. Pa.); *Ebel* v. *Drum*, 52 F. Supp. 189 (D. Mass.); *Wilcox* v. *DeWitt* (S. D. Calif.) (*contra*); *Scherzberg* v. *Grunert* (E. D. Pa.); *United States* ex rel. *Duncan* v. *Kahanamoku* (D. Hawaii).

But what is in the DeWitt Report and not in the Government's brief is scarcely less significant than what is not in the DeWitt Report. The Report is 600 pages long and is extraordinarily detailed. It has many pages of photographs of Assembly Center doings—"a teen-age orchestra tuning up"; "a watermelon-eating contest." It has statistics on the number of Japanese who died of non-venereal genito-urinary diseases in the period from 1937-1941 (p. 204), and that 40 pounds of fish (frozen with heads off) were allowed per 100 persons per meal (p. 187). Yet nowhere in a volume obviously designed as an apologia for the greatest compulsory mass migration in our history is there a line, a word, about the reports of other security officers. General DeWitt does not tell us whether he consulted either the Director of the Federal Bureau of Investigation or the Director of the Office of Naval Intelligence. Before the enormously drastic, difficult and expensive step of mass evacuation was recommended, one would suppose that General DeWitt would have sought information from these other sources as to whether their investigation of the

persons of Japanese ancestry on the Pacific Coast indicated that the population *as a whole* was so dangerous that it must be wholly evacuated, and whether they could assist in some less drastic solution. If the Office of Naval Intelligence and the Director of the Federal Bureau of Investigation recommended complete evacuation, undoubtedly that would have been mentioned in the DeWitt Report. It prints much of the correspondence and memoranda that were exchanged during this period. Since no recommendations from either the O. N. I. or the F. B. I. are referred to, one can only assume either that they were not sought or that they were opposed to mass evacuation.[11] In either case, the inference becomes overwhelmingly strong that what was involved was not military security but race prejudice and hysteria generated in late January and February, 1942, by a small but vocal group on the Pacific Coast. The briefs filed by the Government and by the

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[11] There is a fair indication that, whether or not its recommendations were asked, the O.N.I. would have stated that mass evacuation was wholly unnecessary. In *Harper's Magazine* for October, 1942 (pp. 389-497), there is an article by an anonymous officer described as having been "prepared in May, 1942, by an intelligence officer who for a number of years was stationed on the West Coast and who during that time made a particular study of the Japanese population," and that it was written as a confidential memorandum and released with Government assent. Since it is safe to assume that the Army would not have released it, and since F.B.I. men are not usually referred to as "officers", it is almost certainly from O.N.I., which has always been understood as primarily concerned with Japanese intelligence work. The concluding paragraph of the article states (p. 497):

> "To sum up: The entire 'Japanese Problem' has been magnified out of its true proportion, largely because of the physical characteristics of the people. It should be handled on the basis of the *individual*, regardless of citizenship, and *not* on a racial basis."

In view of all of these facts, we believe the Court must assume that no security reports existed which recommended mass evacuation, unless the Government, which has all of the facts in its possession, now says that they do exist.

Pacific Coast States in this and the *Endo* cases constantly refer to the existence of both of these factors.[12]

How else can one explain the difference between the treatment of citizens of Japanese parentage on the Pacific Coast and in Hawaii. Hawaii was more gravely threatened than the Coast, and it was plainly more important to guard in the Islands against subversive persons. Yet there were no mass evacuations or internments of persons of Japanese ancestry in Hawaii, notwithstanding the fact that there were more of them there, concentrated around our greatest naval base, than there were in the whole of the Pacific coastal strip.[13]

Finally, apart from the fact that the DeWitt Report is thus a wholly untrustworthy recitation, the fact is apparent that even its own statements make no showing of the necessity for complete evacuation of all persons of Japanese ancestry from a huge area. A military necessity for some action does not support a military necessity for *any* meas-

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12 There is a significant correlation between the date upon which complete evacuation was decided upon and the dates when agitation of this sort against the West Coast Japanese reached the hysteria stage. Pearl Harbor created no immediate problem; not until late January and early February of 1942 did certain organizations and newspapers begin to agitate for drastic measures. See House Report No. 1911, Report of Select Committee Investigating National Defense Migration, 77th Cong., 2d Sess. (1942), p. 2; *e. g.*, statement of American Legion of California in Los Angeles Evening Herald Express, January 27, 1942; resolution of Ventura County Board of Supervisors, Los Angeles Times, February 4, 1942; proposal of Los Angeles County Defense Council, Los Angeles Examiner, February 12, 1942; resolution of American Legion University Post No. 11, Seattle Times, February 18, 1942. Generally, this element of the press favored complete military action. See editorial, Los Angeles Times, January 28, 1942. On February 13, 1942, the entire West Coast Congressional Delegation expressed its recommendation for drastic and prompt action in a letter to the President, House Report No. 1911, *supra*, p. 3. On February 14, General DeWitt recommended complete evacuation (Report, p. 33), and the promulgation of Executive Order No. 9066 followed on February 19.

13 No acts of sabotage have been reported in Hawaii since December 7, 1941. House Report No. 1911, *supra*, note 12, pp. 48-58.

use, no matter how drastic. How can military necessity require the evacuation of over a hundred thousand persons from the Pacific Coast and only a handful from Hawaii?

We should emphasize that we are not now seeking to review the action of the Court in the *Hirabayashi* case. There, the Court was forced to speculate upon the military needs, since no statement of them had yet been made. Now we have in the DeWitt Report a complete explanation, apologia, and it is wholly proper that former speculative conclusions should be reexamined in the light of the facts.

But if there is every reason to believe that there was no military necessity for *evacuation*, there is no doubt at all that there was no military necessity for the subsequent *imprisonment* of the evacuees. We can take General DeWitt's word for it, for he states (Report, p. 43):

> "Essentially, military necessity required only that the Japanese population be removed from the coastal area and dispersed in the interior, where the danger of action in concert during any attempted enemy raids along the coast, or in advance thereof as preparation for a full scale attack, would be eliminated."

The *only* justification for imprisonment of American citizens is stated to be the unwillingness of other states and communities to accept them, and the consequent fear of resulting disturbances in the interior states. See also pp. 101, 104, 105. See Government's Brief, pp. 52-53.[14]

We believe that even this reason is magnified out of all proportion to reality. But we need not explore that. The significant fact is that this Court is asked to sanction the

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[14] The suggestion by the Government that there *was* a military necessity of preventing sabotage and espionage in the interior (Brief, p. 55) is worth nothing. Whatever may be the privilege of the Government in arguing what military necessities *might* be when they are unknown, there certainly is no warrant, when the reasons *are* known, for asserting *new reasons never advanced by the military authorities*, as the Government admits (p. 55n).

act of imprisoning American citizens without charges, without trial, without conviction, without any safeguards whatever, *because it is asserted that it is sociologically desirable.* And at the risk of tiresome repetition, we should point out again that even this reason carries no shadow of justification for more than a plan of voluntary refuge for evacuees; *internment* was wholly unnecessary. If this can be permitted under the Constitution, much of Germany's anti-Semitic program can be duplicated in this country with no violation of constitutional rights.[16]

And this internment has not been temporary. Both the exclusion and the internment of persons of Japanese ancestry have continued for over two years. Persons of unquestioned loyalty, who have been through the most intensive investigation and found not wanting in any respect, still remain confined by machine guns to their camps. When a program is continued practically unchanged beyond the need which is alleged to have brought it into existence, the most compelling inference is that the alleged basis is not the true basis at all. The true basis, as we have said above, was hysteria, race prejudice, and a vocal minority which high-pressured a military need for the security measures found adequate elsewhere—as in Hawaii—into a mass uprooting and internment of tens of thousands of innocent persons.

Conclusion.

We believe that unquestionably, therefore, the internment to which petitioner would have been required to submit was unauthorized and unconstitutional. We believe that the

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[15] The Attorney General, at least, is not willing to have the Constitution thus interpreted. In a speech to the Jewish Theological Seminary of America entitled "Democracy and Racial Minority" on November 11, 1943, he is reported as stating (*Common Ground*, Vol. IV, No. 2, p. 5):

> "The War Relocation Authority has no power to intern American citizens; and constitutionally it is hard to believe that any such authority could be granted to the Government."

evacuation itself, had it stood alone, was likewise unconstitutional as far beyond any conceivable military necessity. Petitioner's conviction must be reversed.

This Court cannot ignore the implications of this case. We are living under a Constitution which secures all citizens certain inalienable rights. Yet despite that Constitution, a program of imprisonment of citizens has been carried on by the Government for over two years. Only a reassertion of our constitutional guaranties by this Court can give us assurance that they are not fatally ineffective and have not been fatally impaired.

Respectfully submitted,

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